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82-5902

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RUFUS EUGENE STEVENS,

Petitioner,

- v. -

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether petitioner's rights under the Eighth and Fourteenth Amendments were violated when, after a jury had convicted him of a capital crime, he was sentenced to death by a judge rather than by a jury.

2. Whether petitioner's rights under the Sixth and Fourteenth Amendments were violated when, after a jury had convicted him of a capital crime, the additional factual findings necessary to authorize the imposition of the death penalty: (a) were made by the judge rather than by the jury; and (b) conflicted with the factual findings of the jury, which had recommended life imprisonment.

Parties to the proceeding in the Supreme Court of Florida were:

The State of Florida and Rufus Eugene Stevens.

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STATE OF FLORIDA,

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in this case on September 14, 1982.

OPINION BELOW

The opinion of the Supreme Court of Florida has not yet been officially reported. It is bound with this petition as Exhibit A to the Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on September 14, 1982. On November 5, Justice Powell extended the time to file this petition until December 13, 1982. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . .

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

. . . nor shall any State deprive any person of life . . . without due process of law . . . .

STATUTE INVOLVED

Florida Stat. Ann. §921.141 (West Supp. 1982) is set forth in full as Exhibit B to the Appendix.

STATEMENT

Petitioner was convicted of a capital offense after a jury trial in the Circuit Court of the Fourth Judicial Circuit in and for Duval County in Florida. The evidence showed and the jury evidently found that on March 13, 1979, petitioner and one Scott Engle[1] entered an all-night convenience store and robbed one Eleanor Kathy Tolin, thereafter abducting, raping and murdering her.

At the conclusion of the trial, and pursuant to the provisions of the statute petitioner now attacks, a hearing was held before the trial jury at which evidence of "aggravating circumstances" —— the alleged rape of a fourteen-year-old girl —— was offered by the prosecution and challenged by a witness for petitioner. The jury was properly charged on its statutory task: to determine whether sufficient statutorily defined "aggravating circumstances" existed, to decide whether sufficient statutorily defined or other "mitigating circumstances" existed which "outweighed" the "aggravating circumstances" and then, "based on these considerations," to recommend whether petitioner "should be sentenced to life imprisonment or death." The jury recommended life imprisonment.

On the day of sentence, exercising the power granted him by the statute, the trial judge rejected the jury's recommendation and, finding that five "aggravating" and no "mitigating" circumstances existed,[2] sentenced petitioner to die.

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1. Engle, tried separately, was also convicted of a capital offense. There, too, a judge overrode the jury's recommendation of life imprisonment. Argument has taken place in the Supreme Court of Florida, but no decision has yet been rendered.

2. The five "aggravating" circumstances which the judge found are those set forth in subdivisions (d), (e), (f), (h) and (i) of subparagraph (5) of the statute.

The death penalty was affirmed by a four-to-two vote of the Supreme Court of Florida. This petition followed.

REASONS FOR GRANTING THE WRIT

A. Petitioner's Rights Under the Eighth and Fourteenth Amendments Were Violated When, After Having Been Convicted of a Capital Crime by a Jury, He Was Sentenced to Death by a Judge Since Such a Sentence Failed Adequately to Insure That Its Imposition Was Based Upon the Conscience of the Community

This petition deals with the law of eight states[3] and the lives of approximately thirty-three human beings.[4] Our fundamental proposition is that one convicted of a capital crime by a jury may not constitutionally be sentenced to death for that crime except by a jury, unless a jury sentence be

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3. Seven states give to a judge or group of judges the right to decide whether a defendant convicted of a capital crime after trial by jury should live or die. Four of the seven give to the judiciary that power absolutely, without assistance from a jury. See: Ariz. Rev. Stat. Ann. §13-703 (Supp. 1982); Idaho Code §19-2515 (1979); Mont. Rev. Code Ann. §§46-18-301 to 46-18-306 (Supp. 1981); and Neb. Rev. Stat. §§29-2519 to 29-2525 (1979; Supp. 1982). The remaining three of the seven —— Alabama, Florida and Indiana —— provide for an advisory jury (usually the trial jury) on the fatal issue, its decision not binding on the judge. See: Ala. Code tit. 13A, §§5-45 to 5-53 (1982); Fla. Stat. Ann. §921.141 (West Supp. 1982); Ind. Code Ann. §3550-2-9 (Burns 1979). One state permits a three-judge panel to impose a sentence of life or death if the jury is unable to agree unanimously on the appropriate penalty. See Nev. Rev. Stat. §§175.552 to 175.562 and 200.010 to 200.035 (1981).

4. Our inquiries have revealed that Florida's death row now holds thirty-three inmates who will confront the executioner not by a jury's decision but by that of a judge. We are unaware of how many others may be in the same position in the states listed in note 3 supra.

waived. Such a sentence exposes a capital defendant to the infliction of cruel and unusual punishment.

We recognize that jury sentencing is generally a most uncommon practice in this country,[5] and that at first blush it would therefore appear that it is we who have the great burden to sustain the constitutional imperative in capital cases of a sentencing procedure so rare. But death cases are different, as this Court has had occasion to note.[6] Where life itself is at stake, it is judicial sentencing which is most uncommon.[7] The "evolving standards of decency" which in part determine the meaning of "cruel and unusual punishment,"[8] clearly have evolved toward jury sentencing in capital cases.[9]

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5. See Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 15-16 and n. 59 (1980).

6. See, e.g.: Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, Stewart and Powell, J.J.); Furman v. Georgia, 408 U.S. 238, 286-91 (Brennan, J., concurring), 306-10 (Stewart, J., concurring), 314-71 (Marshall, J., concurring)(1972).

7. Only eight of the states which have a death penalty statute permit a judge to have the final word on the issue, and one of them does so only when a jury has been unable to agree unanimously on the appropriate sentence. See note 3 supra.

8. See, e.g., Trop. v. Dulles, 356 U.S. 86, 101 (1958).

9. Indeed, the preference for jury sentencing in capital cases is seen to be even more clear when it is noted that of the twenty-seven states which require such sentencing, all but one require a life sentence if the jury cannot agree. See Gillers, supra note 5 at 16.

A plurality of this Court stated, in Gregg v. Georgia, 428 U.S. 153, 184 (1976), that capital punishment may be justified when it is the "community's belief" that the crime was "so grievous an affront to humanity that the only adequate response may be the penalty of death."[10] And we have found nothing in any opinion of this Court which suggests a contrary view of what may justify a sentence of death. We respectfully submit, therefore, that a sentence of death may be constitutionally imposed only when the view of the community as to whether the defendant should forfeit his life for his conduct is reliably brought to bear upon the facts of the crime and the circumstances of the defendant. If that be so, then only a jury, unless one is waived, may constitutionally impose a sentence of death. Since the sentencing decision is predominantly, if not exclusively, a decision about whether retribution is warranted,[11] a jury is far more likely than a judge to make a decision reliably reflecting the conscience of the community. Our reasoning is as follows.

First, the jury selection process itself is calculated to see to it that the sworn twelve represent a fair cross-section of the community; there may constitutionally be no systematic exclusion by virtue of race[12] or sex.[13]

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10. See also the reference to the "conscience of the community" in Chief Justice Burger's dissenting opinion in Furman v. Georgia, supra note 6 at 388.

11. See Gillers, supra note 5 at 53-56.

12. See, e.g.: Norris v. Alabama, 294 U.S. 587 (1935); Carter v. Jury Comm'n, 396 U.S. 320 (1970).

13. See, e.g.: Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

On the other hand, the overwhelming majority of judges who may be called upon to impose a death sentence are white males with a far better than average income, education and intellect —— hardly what could be called a "fair cross-section of the community."[14]

Second, that same process is also calculated —— by means of the voir dire and the exercise of challenges for cause and peremptory challenges —— to remove from the final jury those whose views are at either extreme of the issue as to when the death penalty should be imposed. With rare exceptions, neither side in a capital case may cause the disqualification of the judge, even when his views on the death penalty are so extreme as would have disqualified or caused the excusal of any juror who held them.[15]

Third, the very nature of the jury system permits the almost-anonymous juror to vote his conscience on the death penalty without pressure by his or her peers. The clearly-visible judge, on the other hand, who may soon be facing

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14. In Florida's Fourth Judicial Circuit, for example, there were twenty-two Circuit Court judges at the time of petitioner's trial. See 53 Fla. Bar J. #8 (Sept. 1979), p. 566. Of those twenty-two, only two (9%) were women and only one (4-1/2%) was black. Women comprised 52% and blacks 22% of the total population of the Circuit in 1980. See United States Bureau of Census, 1980 Census of Population and Housing: General Population Characteristics for Florida, Table 45. The same disparity exists in Florida as a whole. There are some 339 Circuit Court judges of whom eighteen (5.4%) are women and eight (2.4%) are black. Women comprise 52% and blacks 14% of the entire population. See Ibid, Table 18.

15. Anthony Lewis has reported that shortly after this Court's rejection in Furman v. Georgia, supra note 6, of the nation's death penalty statutes as they then existed, a Florida judge demonstrated his view of the case by publicly throwing a hangman's noose over the limb of an oak tree in front of his courthouse. Lewis, "Cruel and Unusual," The New York Times, October 21, 1982, p. A31, c. 1-2. That such a "hanging judge" might override the community's view, as expressed by a jury's advisory life sentence, and order a defendant to be executed, is constitutionally intolerable and does not even give the appearance of justice.

re-election[16] or re-appointment, may find it difficult to withstand pressures on him to favor death over life in a given case or class of cases.

Fourth, empirical studies have shown that when judges and jurors disagree on whether a defendant convicted of a capital crime should live or die, the judge is far more likely to opt for death than the jury.[17] In Witherspoon v. Illinois, 391 U.S. 510 (1966), this Court held unconstitutional a jury selection system which made it far more likely that the jury —— which had the final word on life or death would vote in favor of the ultimate punishment rather than extend mercy. We submit that, although different considerations are involved in the two issues, the principles involved in that case and this are basically the same. Having struck down a system which weighted the odds against a defendant at the very start of a capital trial, this Court should do the same with a procedure with a similar effect at the very end.

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16. Florida Circuit Court judges are elected for six-y terms.

17. The Florida statistics, as set forth in Gillers, supra note 5 at 67-68 and n. 318, illustrate the point with particular relevance. Moreover, we have been advised by those in Florida who have followed such cases closely that, since the enactment of the statute petitioner now challenges some seventy-two jury recommendations of life imprisonment have been overridden by the trial judiciary, which has reduc jury death recommendations on only approximately fifteen occasions. Those figures are striking. We submit that with such great judge-jury disparity on what the conscience of th community has to say about the fate of one convicted of a capital crime, it is almost certainly the judges, not the ju who have misread the will of the community.

of the trial.[18]

We respectfully submit, therefore, that this Court should grant the petition and rule whether the statute violates the Eighth and Fourteenth Amendments.[19]

B. Petitioner's Rights Under the Sixth and Fourteenth Amendments Were Violated When, After a Jury Had Convicted Him of a Capital Crime, the Additional Factual Findings Necessary To Authorize the Imposition of the Death Penalty: (1) Were Made by the Judge Rather Than by the Jury; and (2) Conflicted With the Factual Findings of the Jury, Which Had Recommended Life Imprisonment

This petition involves considerations under the Sixth Amendment as well as under the Eighth. It is our fundamental proposition that when, in order for a capital

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18. One would think that a Florida judge's override of a trial jury's recommendation of a life sentence would be a relatively rare event, since the Supreme Court of Florida, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), stated that in order to justify an override, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." But such has surely proven not to be the case, unless one is prepared to believe that, since 1972, some seventy-two carefully-chosen capital juries have included a majority of jurors reasonable enough to be selected, hear the evidence and find the defendant guilty but who became unreasonable when deliberating during the penalty phase of the trial.

19. It is perhaps worth noting that the statute was the Florida legislature's response to this Court's decision in Furman, supra note 6, although it is clear that Furman did not require judicial sentencing after the recommendation of an advisory jury. Prior to Furman, a Florida defendant convicted of a capital crime would be sentenced to death unless the jury, by a majority vote, recommended life imprisonment. Immediately after Furman, the current statute was passed, ostensibly to comply with the dictates of that case. See Gillers, supra note 5 at 44 n. 207. Ironically, absent Furman and the Florida legislature's misinterpretation of it, petitioner would not now be on death row.

defendant to be sentenced to death, there must be a finding of certain "aggravating" facts not included in the definition of the capital crime itself, then that finding must be made by a jury rather than by a judge. Our reasoning follows.

First, the so-called "penalty stage" of the trial, which involves, either with or without the reception of additional evidence, a determination as to whether certain "aggravating" or "mitigating" circumstances exist, is as much of an adversary procedure as is the culpability stage. Indeed, where guilt is clear but proper punishment is not, it may be a more hotly-contested portion of the trial than any other. In Bullington v. Missouri, 451 U.S. 430, 446 (1981), this Court noted that it had already held "that many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing similar to that required by Missouri in a capital case." The Court cited Specht v. Patterson, 386 U.S. 605, 608 (1967), as a case in which various due process rights such as counsel, confrontation and the presentation of favorable evidence, were held available at a hearing at which the sentence might be determined based upon "a new finding of fact . . . that was not an ingredient of the offense charged." The statute petitioner challenges here creates a sentence procedure much like the Missouri one mentioned in Bullington and involves the imposition of sentence based on new facts, like the sentencing procedure referred to in Specht. We submit that it would be anomalous indeed for this Court to refuse to add to the list of due process rights available to a defendant at such a crucial hearing the right described in Duncan v. Louisiana, 391 U.S. 145, 149

(1968), as "fundamental to the American scheme of justice."[20] There, at stake because a judge decided facts, rather than a jury, was sixty days in jail and a fine of $150; here, it is petitioner's very life.

Second, this Court has consistently held that an accused is entitled to a jury determination of all factual issues on which his fate depends. See, e.g.: Sandstrom v. Montana, 442 U.S. 510, 523 (1979) ("factfinding function" in a criminal case "the law assigns solely to the jury"); United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977) ("in a jury trial the primary finders of fact are the jury"). Here, however, petitioner never got a true jury trial on the critical statutory issues whether "aggravating" circumstances existed and whether "mitigating" circumstances existed which outweighed the "aggravating" circumstances. It was upon the resolution of those issues —— clearly factual —— that petitioner's life depended, yet the Florida statute permitted the judge, rather than the jury, to resolve those issues, and thus violated his right to a jury trial. For that reason, this Court should condemn the Florida procedure just as the Supreme Court of Oregon, In Banc, unanimously struck down an Oregon procedure which had a similar defect in State v. Quinn,

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20. Duncan also described an accused's right to have the facts decided by a jury as: one of "the most essential rights and liberties of the colonists" (p. 152); a further protection against the "arbitrary action" of the judiciary (p. 156); "an inestimable safeguard against . . . the compliant, biased, or eccentric judge" (p. 156); "a defense against arbitrary law enforcement" (p. 156); and a result of our society's "reluctance to trust plenary powers over the life and liberty of the citizen to one judge or to a group of judges" (p. 156).

50 Or. App. 383, 623 P.2d 630 (1981).[21]

Finally, the record in this case demonstrates that the judge imposed the sentence of death not only in reliance upon the existence of "aggravating" circumstances never passed upon by the jury but, of far greater importance, in reliance upon the absence of "mitigating" circumstances which the jury clearly found to exist and found to outweigh the "aggravating" circumstances. A brief recitation of the facts is necessary to make our point.

Immediately after the culpability stage of the trial ended by the jury's verdict of guilt, the penalty stage began. The jury heard two witnesses (pro and con) on the factual issue whether petitioner had previously raped a fourteen-year-old girl.[22] The prosecutor then summed up, going through the statutory list of "aggravating" and "mitigating" circumstances. He specifically told the jurors that there were a number of the former upon which the State did not rely, and included in that category items (e) and (f), thereby removing from the jury's consideration whether the capital crime had been

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21. There, after the jury found the defendant guilty of capital murder, the definition of which did not include the concept of deliberation, the trial judge, pursuant to the statute, made a factual determination that defendant had acted deliberately and the judge was therefore authorized to impose a sentence of death, which he did. Oregon's high court held that the defendant had thus been denied his right to trial by jury under the Constitution of Oregon. We respectfully submit that Oregon's constitutional right to a jury trial is no different —— and surely no stronger —— than that enshrined in the Sixth Amendment.

22. This inquiry was relevant to prove the absence of mitigating circumstance (a) —— "the defendant has no significant history of prior criminal activity."

committed to avoid arrest or for pecuniary gain.[23]

After having been accurately charged on the meaning of the penalty statute, the jury deliberated and then recommended a life sentence. That recommendation clearly meant that they had found as a fact that one or more "mitigating" circumstances existed and, further, outweighed whatever "aggravating" circumstances they had found to exist.

On the day of sentence, the trial judge not only found the existence of "aggravating" circumstances —— including the two which the prosecutor had withdrawn from the jury's consideration —— but also found, despite the jurors' opposite finding, that there existed not a single "mitigating" circumstance. The record shows, therefore, not merely a judge-jury disagreement as to the penalty appropriate to a given set of agreed-upon facts —— a disagreement which might cause only Eighth Amendment problems —— but a fundamental disagreement as to the facts upon which the statute made petitioner's life depend. We respectfully submit that petitioner had a Sixth Amendment right to have those crucial facts resolved solely by a jury of his peers.[24]

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23. Annexed hereto as Exhibit C to the Appendix are the pertinent pages of the prosecutor's penalty stage summation. See p. 1, l. 17 to p. 2, l. 3.

24. Lest it be argued that the judge-sentencing provision of the statute was upheld in Proffitt v. Florida, 428 U.S. 242 (1976), we note that the issue was not involved in the case, since the advisory jury had in fact recommended death. Moreover, two years later, this Court, in Lockett v. Ohio, 438 U.S. 586, 609 n. 16 (1978), stated it need not reach Lockett's "contentions that the Constitution requires that the death sentence be imposed by a jury . . .;" it did not state that the issue had already been resolved by Proffitt.

CONCLUSION

For the foregoing reasons, the writ requested should be granted.

Dated: New York, New York
December 13, 1982

Respectfully submitted,

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Supreme Court of Florida

No. 57,738

RUFUS EUGENE STEVENS, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[September 14, 1982]

PER CURIAM.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Fourth Judicial Circuit in and for Duval County. The appellant was convicted of murder in the first degree. After receiving the jury's recommendation of a sentence of life imprisonment, the trial court sentenced appellant to death. This Court has jurisdiction of the appeal. Art. V, § 3(b)(1), Fla. Const. We affirm the judgment and sentence.

During the early morning hours of March 13, 1979, Eleanor Kathy Tolin, while working as cashier at an all-night convenience store, was robbed, abducted, raped, and killed. The appellant Rufus Stevens and his friend Scott Engle were jointly indicted on a charge of first-degree murder. The two defendants were tried separately.

Appellant was arrested at his home at about 3:30 a.m. on March 20, 1979. Later that morning appellant signed a confession admitting participation in the robbery, abduction, and rape, but placing the blame for the murder on Engle. Before trial, appellant moved to suppress his confession on the ground that his

state of severe intoxication at the time rendered his statement involuntary. At the hearing on the motion to suppress, appellant testified that during the day and evening preceding his arrest and interrogation, he consumed one and one-half to two cases of beer and some whiskey. An expert testified that such a level of alcohol consumption would have an extremely debilitating effect on a normal person's cognitive and motor processes. The state presented testimony that at about midnight on the night of his arrest, by which time most of the alcohol consumption appellant testified to would have been completed, appellant was able to converse coherently and drive a car. The arresting officer and the interrogating officer testified that at the time of arrest and during questioning, appellant was intelligible and capable of coherent conversation. In conjunction with his motion to suppress, appellant asked for an opportunity to reproduce the effects of the alcohol ingestion he testified to, in order to demonstrate to the court his mental state at the time of his confession. The court declined to allow such test or demonstration and denied the motion to suppress.

Based on appellant's confession in which he admitted participation in the robbery and abduction but blamed the actual killing on Engle, the state indicated a willingness to allow appellant to plead guilty in exchange for a recommended sentence of life imprisonment rather than death, or to plead guilty to a lesser, non-capital offense. As a condition precedent to such a plea bargain, the state demanded a polygraph examination for the purpose of determining the extent of appellant's participation in the criminal episode leading to the murder. Appellant agreed to submit to the polygraph test.

At the place and time scheduled for the examination, only appellant and the police polygraph examiner were present. Before being connected to the machine, appellant spontaneously made some statements concerning his participation in the crime. The immediate result of appellant's utterances was that the examiner did not proceed with the examination. A further result was that

the state discontinued the plea negotiations, since appellant's statements were inconsistent with his earlier confession.

The defense moved to exclude these statements on the grounds that they were made in connection with plea negotiations and that the state had promised that the polygraph statement would not be used in evidence. The trial court ruled that the statements could not be used by the state in its case in chief but deferred ruling on whether they might be used in rebuttal.

At trial the state presented evidence that Kathy Tolin disappeared from her job during the early morning hours of March 13, 1979. Her body was later discovered in a wooded area nearby. She had been raped, strangled, stabbed, and mutilated. Either the strangulation or the stabbing could have been the cause of death.

The interrogating officer testified to appellant's confession made soon after his arrest. According to this statement, appellant directly participated in robbing, kidnapping, and raping the victim. He and his accomplice abducted her from the store and took her into some woods. Appellant said, however, that she ran away after being raped, and that Engle ran after her. Fifteen minutes later, according to the confession, Engle returned, dragging the dead body of the victim. Then appellant and Engle placed the body in the trunk of appellant's car and removed it to another wooded area.

A state witness who was well acquainted with both appellant and Engle testified that he was present when appellant and Engle made a plan to rob the convenience store, and that they left him at his home at about 2:00 a.m. on the night of the murder and departed, with robbery as their stated purpose, in appellant's car, with appellant driving. After the murder, the witness testified, appellant remarked to him "We got to get rid of Scott's knife because that's what it was done with." Testimony and Proceedings, vol. V, at 573. This witness also testified that he talked with Engle about the murder and that Engle refused to give up his knife, indicating that he did not

believe the knife could be linked to the murder. The witness testified:

> I asked him why they did it and he said that they took her out of the store to get her away from a phone. They took her out into the country and Rufus went crazy and started saying she's going to identify us. And I asked him, I said, man, was it worth killing a little gal over a lousy fifty-dollar robbery and he said no. It wasn't.

Id. at 377-78.

The testimony of the state's main witnesses was corroborated by several items of physical evidence. Police recovered the knife identified as belonging to Scott Engle and established as having been the murder weapon. A minute amount of blood was found on the knife which could have been the blood of Kathy Tolin but could not have come from Engle or appellant. Blood found in the trunk of appellant's car was also of the victim's blood type. Hairs recovered form the back seat and trunk of appellant's car were probably those of the victim, according to expert testimony.

Appellant argues four points on appeal. He maintains that (1) the court erred in refusing to grant in full his motion to exclude the statements he made to the polygraph examiner; (2) that the court erred in denying his request to conduct an experiment to demonstrate the effects of the level of alcohol intoxication with which he asserts he was afflicted at the time of his arrest and interrogation; (3) that the court erred in refusing to suppress his confession; and (4) that the court erred in sentencing him to death when the jury recommended life imprisonment.

On the first point, appellant argues that the court's ruling, excluding the statement to the polygraph examiner from evidence on the state's case in chief, left open the possibility that the statement could have been used for impeachment or rebuttal purposes in the event appellant had testified in his own defense. Indeed it did leave open such a possibility since the court specifically stated in its order of exclusion that in the event of the defendant's choosing to testify in his own defense,

the court would entertain a proffer of the statement for purposes of impeachment. Appellant argues that the statement should have been completely excluded and that the error prejudiced his defense by preventing him from testifying in his own behalf.

Appellant argues that his statement was made in connection with plea negotiations and was therefore inadmissible for any purpose under section 90.410, Florida Statutes (1979)[1] and Florida Rule of Criminal Procedure 3.172(h).[2] The state argues that the trial judge was correct in its ruling. The fact that the statement was excludable from the case in chief, the state argues, should not provide a license for an accused to commit perjury free from the risk of being confronted with prior inconsistent statements, citing Oregon v. Hass, 420 U. S. 714 (1975) and Harris v. New York, 401 U. S. 222 (1971). The state had agreed that the polygraph results would not be used in evidence; however, the state argues that the statement in question is not part of the result of a polygraph examination.

To determine whether a statement is made in connection with plea negotiations, a court should use

> a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978)(en banc); see also United States v. O'Brien, 618 F.2d 1234 (7th

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[1] 90.410 Offer to plead guilty; nolo contendere; withdrawn pleas of guilty.--Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

[2] (h) Except as otherwise provided in this Rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

Cir.), cert. denied, 449 U. S. 858 (1980); United States v. Pantonan, 602 F.2d 855 (9th Cir. 1979). Whether a defendant's subjective expectation of negotiating a plea is reasonable depends on whether the state has indicated a willingness to plea-bargain and has in fact solicited the statement in question from the defendant. Unsolicited, unilateral utterances are not statements made in connection with plea negotiations. See Blake v. State, 332 So.2d 676 (Fla. 4th DCA 1976).

We conclude that the statement in question was not made in connection with plea negotiations. Although the polygraph examination was arranged so that appellant's version of the criminal episode could be substantiated and although this was agreed to so that the parties could proceed to reach a negotiated plea, appellant's spontaneous, unilateral statement was not connected to those negotiations in the sense contemplated by the rule of exclusion we are applying. The statement was not made during an actual polygraph examination nor was it made in response to any preliminary questions. Appellant made the statement spontaneously without any prompting or inducement. Appellant had no reasonable subjective belief that his statement was a part of the plea negotiations. Therefore, not only was the trial court correct in holding that the statement was admissible for impeachment, but the court could also have ruled the statement admissible for use in the state's case in chief.

Next appellant argues that the court should have excluded his confession from evidence. He contends that, although he was advised of his Fifth Amendment rights in the standard fashion, he was led to believe that if he cooperated with police he would obtain leniency. In support of this contention appellant points not to any actual police inducement, but to the fact that the interrogating officer was evasive when appellant asked him whether the case might lead to the death penalty being imposed. In essence appellant contends that without knowing that a sentence of death was a possible penalty, he cannot have

knowingly waived his constitutional right to remain silent. See Miranda v. Arizona, 384 U. S. 436 (1966).

The same kind of argument was raised in United States v. Hall, 396 F.2d 841 (4th Cir.), cert. denied, 393 U. S. 918 (1968). The court rejected the argument saying:

> It is undisputed that at the time of arrest Agent Dowling did not inform Hall of the punishment he might receive if he were convicted of the robbery with which he was charged. Hall argues that without this knowledge he simply was not in a position to make the knowing and voluntary waiver contemplated by Miranda. Miranda, however, reflects the Supreme Court's concern that an accused might, to his detriment, forfeit rights afforded him by the Constitution simply because he was not aware that he possessed such rights. We do not find in that decision any intimation that knowledge of the punishment for the crime with which he was charged is a prerequisite to a valid waiver of constitutional rights and we conclude that the validity of Hall's waiver is not vitiated by the admitted absence of knowledge or information as to the possible punishment.

Id. at 845. We agree. A police interrogator must neither abuse a suspect, nor seek to obtain a statement by coercion or inducement, nor otherwise deprive him of Fifth or Sixth Amendment rights. As a safeguard against such improprieties, the Miranda warnings have been prescribed. But a police interrogator's job is to gain as much information about the alleged crime as possible without violating constitutional rights, and it is not his duty to apprise a suspect of the possible punishment for the crime under investigation. The ultimate punishment to be meted out upon one convicted of a crime depends on the nature of the formal charges filed, which is often a function of prosecutorial discretion, the outcome of the trial, and the exercise of discretion by the sentencing judge. At the investigatory stage of the criminal justice process, it is quite proper for an investigating officer to decline to speculate on the possible ultimate result. Therefore we hold that the court did not err in denying the motion to suppress the confession.

Appellant's third point is that the trial court erred in denying appellant's novel and imaginative request to be allowed to drink two cases of beer in order to demonstrate to the court

his state of intoxication when he confessed. He argues that the experiment should have been allowed because the result would have been relevant to the question of whether he was capable of intelligently and voluntarily waiving his constitutional rights.

The admissibility of a test or experiment lies within the discretion of the trial judge. Reid v. State, 68 Fla. 105, 66 So. 725 (1914); Hisler v. State, 52 Fla. 30, 42 So. 692 (1906). A court should admit evidence of scientific tests and experiments only if the reliability of the results are widely recognized and accepted among scientists. Rodriguez v. State, 327 So.2d 903 (Fla. 3d DCA), cert. denied, 336 So.2d 1184 (Fla. 1976); Coppoline v. State, 223 So.2d 68 (Fla. 2d DCA 1968), appeal dismissed, 234 So.2d 120 (Fla. 1969), cert. denied, 399 U. S. 927 (1970); 3 S. Gard, Jones on Evidence, § 15:9 (6th ed. 1972).

To allow the defendant to present himself to the court for observation after drinking two cases of beer would have had a very predictable result but would not, it seems to us, have risen to the dignity of an accepted scientific test or experiment. Appellant's motion was supported only by his own testimony that he was so intoxicated that he was not aware of what he was doing. There was other testimony, however, that he was coherent and functioning normally at the time of his arrest. Therefore we conclude that the trial court did not abuse its discretion in denying the motion.

We come now to the propriety of the sentence of death. The trial judge found that the murder was committed in the commission of or flight after committing rape and kidnapping, an aggravating circumstance under section 921.141(5)(d), Florida Statutes (1977); that it was committed for the purpose of avoiding or preventing a lawful arrest, id., § 921.141(5)(e); that it was committed for pecuniary gain, id., § 921.141(5)(f); and that it was especially heinous, atrocious, or cruel. Id., § 921.141(5)(h). The judge also specifically found that the defense established no mitigating circumstances.

There was sufficient evidence to support the trial judge's

findings that the four aggravating circumstances were proven beyond a reasonable doubt. Evidence presented at the guilt phase of the trial established that the murder was the ultimate result of a closely connected chain of events that included kidnapping and sexual battery. Thus the court was correct to conclude that the aggravating circumstance in section 921.141(5)(d)[3] applied. The finding that the murder was committed for pecuniary gain was supported by evidence that appellant and his accomplice took money from the store's cash register, the property of the victim's employer and in her possession until the robbery and abduction. That the murder was committed for the purpose of avoiding arrest for crimes already committed was established by testimony about appellant's own statement to his accomplice expressing fear of detection and apprehension and insisting on the need to eliminate the victim as a possible identifying witness. See Adams v. State, 412 So.2d 850 (Fla. 1982). Finally, the terror and pain the victim must have felt while being abducted, brutally raped, and then strangled and stabbed to death, establishes that the capital felony was especially heinous, atrocious, or cruel. E.g., Jackson v. State, 366 So.2d 752 (Fla. 1978), cert. denied, 444 U. S. 885 (1979); Knight v. State, 338 So.2d 201 (Fla. 1976).

Appellant argues that the trial judge erred in failing to find the existence of mitigating circumstances. He argues that the court should have found that he had no significant history of prior criminal activity. § 921.141(6)(a), Fla. Stat. (1977). The court found, however, that appellant had previously been convicted of theft, receiving stolen property, and criminal trespass. In addition, during the sentencing hearing, a teenage girl testified that appellant had raped her. Thus there was no

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3. Section 921.145(5)(d) reads: "The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb."

reason for the court to find a lack of significant history of prior criminal activity. See Dobbert v. State, 328 So.2d 433 (Fla. 1976), aff'd, 432 U. S. 282 (1977).

Appellant argues that the court should have found that due to intoxication and extreme mental or emotional disturbance, his ability to appreciate the criminality of his conduct and to conform to the requirements of the law was substantially impaired. § 921.141(6)(b), (f). There was no evidence to support such findings. A court-appointed psychiatrist reported no extreme mental or emotional disturbance. No testimony supported a finding of impaired capacity. Therefore the court did not err in declining to find these factors. See Meeks v. State, 336 So.2d 1142 (Fla. 1976).

Appellant argues that the trial court should have found that his participation in the crime was relatively minor and that he acted under the substantial domination of another person. § 921.141(6)(d), (e). The trial judge specifically found, however, that both appellant and Engle were guilty of the crimes and that neither was under the domination of another. There was testimony at the guilt phase of the trial that appellant initially approached Engle and proposed robbing the store. In addition, the same witness testified that Engle told him after the incident that the murder also was appellant's idea. Furthermore, the presentence investigation received by the sentencing judge but not provided to the jury supplied further information concerning the crime. In statements made to the court-appointed psychiatrist, appellant conceded that the robbery and kidnapping were originally his idea. He also admitted mutilating the victim's vagina. Therefore there was sufficient evidence for the court to refuse to find that appellant's role was minor or that he was dominated by Engle.

Finally, appellant argues that the trial court erred in overriding the jury's recommendation of life imprisonment. The sentencing judge must accord great weight to a jury's recommendation of life imprisonment, but may decline to follow it

if the facts indicating that a sentence of death is appropriate under the law are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The record amply supports the judge's findings of four aggravating circumstances and a total lack of mitigating circumstances. Therefore, death is the appropriate punishment. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U. S. 943 (1974). Under the properly established facts and circumstances, it was proper for the judge to override the jury's recommendation. The recommendation of life was not based on any valid mitigating factor discernible from the record. See Hoy v. State, 353 So.2d 826 (Fla.), cert. denied, 439 U. S. 920 (1978); Douglas v. State, 328 So.2d 18 (Fla.), cert. denied, 429 U. S. 871 (1976).

The judgment of conviction of first-degree murder is affirmed. The sentence of death is affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD and SUNDBERG, JJ., Concur
McDONALD, J., Concurs in part and dissents in part with an opinion, with which OVERTON, J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., concurring in part/dissenting in part

I concur with the affirmance of conviction but dissent on the imposition of the death penalty. The jury recommended that the sentence be life imprisonment. The jury could have concluded that Stevens participated in the robbery and rape, but that Engle was the sole perpetrator of the homicide. There was, therefore, a rational basis for the jury's recommendation and it should have been followed by the trial judge.

OVERTON, J., Concurs

An Appeal from the Circuit Court in and for Duval County.

John E. Santora, Jr., Judge - Case No. 79-1180-CF Div. R

John R. Forbes, Jacksonville, Florida.

for Appellant

Jim Smith, Attorney General and Raymond L. Marky, Assistant Attorney General, Tallahassee, Florida.

for Appellee

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty. — Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution

of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. —— After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. —— Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and

the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence. —— The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rles promulgated by the Supreme Court.

(5) Aggravating circumstances. —— Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an

escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances. — Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

people, just her. So, that one won't apply.

But this one, now, listen to this one: That the crime for which the defendant is to be sentenced was committed while the defendant was engaged in the commission of or attempting to commit or flight after committing or attempting to commit a robbery; that the crime for which the defendant was to be sentenced was committed while the defendant was engaged in the commission of and so forth, a kidnapping, and the same language for rape or sexual battery. He committed three of the crimes that the legislature saw fit to define as extra bad crimes, so bad they replace premeditation when committed in some of those crimes.

He committed three of them and I ask that you and respectfully request that you consider that particular aggravating factor in your deliberations.

That the crime for which the defendant was to be sentenced was committed for the purpose of avoiding or preventing any lawful arrest. No, he was not escaping when he killed her. That is talking about shooting at policemen.

The crime for which the defendant is to be sentenced was committed for pecuniary gain. They robbed her but that is not a factor for you to

consider here because he robbed her in that it is combined under the law, so that is not really under the law, really one that you should consider in all candor.

The next one is disrupting or handling the lawful exercise of any governmental function, which we must not avoid use of in our society and it doesn't apply but listen to this one, it's very difficult, as I said, no crime is going to fit all of these, no crime is going to fit more than two or three of them, so each one must be considered as to the facts of this case that you have before you.

That the crime for which the defendant is to be sentenced was especially heinous -- especially heinous. Number eight, middle of the night, raped in the middle of the night, kidnapped, fear, terror -- I can't think of anything more heinous; a dark road, a dark alley, that the crime for which the defendant is to be sentenced was especially atrocious. Incidentally, let me say this: heinous, heinous, however you pronounce it, I think it's heinous, means extremely wicked or shockingly heinous.

Now, I ask you to apply your intellect or common sense as to whether or not this crime was either extremely wicked or shockingly evil because that's what

NO. 82-5902

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RUFUS EUGENE STEVENS,

Petitioner,

-VS-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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COUNSEL FOR RESPONDENT

QUESTION PRESENTED

WHETHER THIS COURT HAS JURISDICTION PURSUANT TO 28 U.S.C. §1257(3) WHERE THE PETITIONER HAS NOT DEMONSTRATED THE ISSUES RAISED WHERE PRESENTED TO AND DISPOSED OF BY THE COURT TO WHICH THE PETITION IS DIRECTED.

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OPINION BELOW

The opinion of the Supreme Court of the State of Florida which is sought to be reviewed is reported as Stevens v. State, 419 So.2d 1058.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) and to the extent that a substantial federal question was properly raised by Petitioner and disposed of by the Florida Supreme Court this Court has jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

The statutory provision involved, in addition to those specified in the petition, is 28 U.S.C. §1257(3), which provides:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth on page three of the petition for the purpose of answering said petition. Additional facts are contained in the written opinion of the Florida Supreme Court. Respondent wishes to add that no where in the Florida Supreme Court's opinion is there any discussion or resolution of the constitutional claims presented to this Court by Petitioner. This is because Petitioner did not raise these issues. The only claim which he advanced was that the trial judge erred in overriding the jury's recommendation under the standards announced in Tedder v. State, 322 So.2d 908,

910 (Fla.1975) which this Court validated in Dobbert v. Florida, 432 U.S. 282, 295 (1977). The Florida Supreme Court merely held the trial judge did not err in rejecting the jury recommendation because there were four aggravating circumstances and no mitigating circumstances.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Respondent submits that without regard to the merits of the claims presented, which it will not discuss at this time, the petition must be dismissed for want of jurisdiction. Cardinale v. Louisiana, 394 U.S. 437 (1969) and Webb v. Webb, 451 U.S. 493 (1981).

Notwithstanding the explicit requirement of Rule 23(1)(f), Rules of the Supreme Court, that the petitioner specify "in the statement of the case . . . the stage in the proceedings in the court of first instance and in the appellate court, at which, and in the manner in which, the federal questions sought to be reviewed were raised. . ." that has not been done in this case. This deficiency is due to the fact that the purported federal questions were not presented to the Florida Supreme Court. Because they were not presented they obviously were not disposed of by that court.

In Webb v. Webb, supra, this Court dismissed for want of jurisdiciton a petition for certiorari where the record failed to disclose the federal question was presented to the Georgia Supreme Court and disposed of by that court. This Court said:

> ". . . It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. . . ."

451 U.S. 496.

See also: Cardinale v. Louisiana, supra, at 438 (writ dismissed for want of jurisdiction after briefing and oral argument where record showed issue not presented in the state court).

In view of this deficiency and the fact that Respondent cannot confer jurisdiction on this Court, it must take the position that the petition for writ of certiorari must be denied on jurisdictional grounds. For obvious reasons, but for this legal impediment Respondent would address the merits, urge that the writ issue and ask that the judgment and sentence be summarily affirmed.

CONCLUSION

Petitioner has totally failed to demonstrate this Court has jurisdiction to entertain the petition for writ of certiorari and unless he can do so, the petition must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been forwarded to Mr. Patrick M. Wall, 36 West 44th Street, New York, NY 10036, via U. S. Mail, this 10th day of January 1983.

Raymond L. Marky
Raymond L. Marky
Assistant Attorney General